

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	R.93-04-003
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	I.93-04-002
Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	R.95-04-043
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	I.95-04-044

**JOINT MANAGING COMMISSIONER'S AND  
ADMINISTRATIVE LAW JUDGE'S RULING**

On October 23, 1997, the California Telecommunications Coalition (Coalition)<sup>1</sup> and the Telecommunications Resellers Association (TRA)<sup>2</sup> filed a motion requesting that the California Public Utilities Commission (Commission) establish additional

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<sup>1</sup> Coalition members joining in the motion include AT&T Communications of California, Inc. (AT&T), California Association of Competitive Telecommunications Companies, MCI Telecommunications Corporation (MCI), Sprint Communications Company (Sprint), Teleport Communications Group, Time Warner AxS, The Utility Reform Network, Working Assets, and WorldCom, Inc.

<sup>2</sup> TRA describes itself as "a national organization representing more than 500 telecommunications service providers and their suppliers who offer a variety of competitive telecommunications services throughout the U.S. Many TRA members serve subscribers in the State of California." Motion at 3.

procedures to facilitate its consultative role with the Federal Communications Commission (FCC) under Section 271<sup>3</sup> of the Telecommunications Act of 1996<sup>4</sup> (the Motion). The Motion notes that in 1996, pursuant to the Managing Commissioner's Ruling (MCR), the Commission began the process of developing a record to support the consultative function that it would eventually assume. The Motion further states that while comments were submitted in response to the MCR, there has been little recent activity in the consolidated docket. It expresses concern that the existing record might be quite stale in light of several FCC actions that set forth a type of roadmap for states to follow in evaluating a BOC's application. To substantially update the existing record, the Coalition and TRA urge the Commission to establish the following procedures:

- Order Pacific to notify the Commission at least 90 days prior to filing a section 271 application at the FCC.
- Require Pacific to provide, at the time of the notice, all data upon which it intends to rely to prove that its application should be granted. The data should be sufficient to satisfy standards and the burden of proof established by the FCC.
- Order Pacific to provide, along with its 90-day advance notice, a working draft copy of the application it intends to file.
- Require Pacific to disclose in detail how it intends to bring "items" which do not satisfy all of the provisions of section 271 at the time of Commission notification into compliance by the time it files with the FCC. Require Pacific to provide updated information regarding changes in the status of its compliance with section 271.
- Permit discovery pursuant to a schedule determined by the Commission.

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<sup>3</sup> Section 271 provides the mechanism by which SBC/Pacific Bell (Pacific) and the other Bell Operating Companies (BOCs) may apply for authorization to provide interLATA service originating in the states in their regions. It also grants the state commissions an advisory role in the process.

<sup>4</sup> Hereafter, referred to as the Act.

- Set a procedural schedule that provides for written comments and testimony by interested parties.
- Schedule public hearings and provide for cross-examination of Pacific's witnesses.
- Provide parties with an opportunity to file closing comments following the hearings.

The Coalition and TRA assert that the 90-day pre-filing procedure is critical to ensuring that the Commission and interested parties have concrete current information to use in evaluating Pacific's application. They also maintain that a requirement to state what additional steps Pacific will take before filing its FCC section 271 application in order to fully implement those competitive checklist (Checklist) items not yet in compliance will address the problems caused by late-filed factual material. In its *Ameritech/Michigan Order*<sup>5</sup>, the FCC found that new factual evidence presented in the course of the proceeding could not be adequately evaluated by the relevant state commission or the FCC. Further, interested parties were denied an opportunity to comment on the new evidence. The FCC determined to give no weight to such late filings of factual data.

The Motion lists approximately twelve states<sup>6</sup> that have adopted 90-day pre-FCC filing notification requirements. It contends that each of the twelve state commissions has attempted to craft procedures that best prepare it for the tight timeline of the section 271 filing, minimize confusion, "create a comprehensive public record on relevant issues, and permit meaningful participation and input by interested parties." Motion at 11. The more specific and focused the inquiry, the Motion notes, the better

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<sup>5</sup> Memorandum Opinion and Order in the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, August 19, 1997.

<sup>6</sup> Arizona, Colorado, Iowa, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, and Utah.

positioned the state commissions will be in ascertaining pertinent facts. In illustration, the Coalition and TRA appended a copy of the Colorado PUC's pre-FCC filing order.

The Coalition asserts that the Commission has the flexibility to adapt its normal processes in order to develop a thorough record that is as efficiently and expeditiously compiled as it is fully participatory. It urges, given the nature of this proceeding, that the Commission dispense with the issuance of a "Section 311 Proposed Decision" (PD)<sup>7</sup> so as not to "compress the amount of time that could be devoted to fact-finding, investigation and hearing." The Coalition argues that dispensing with the PD is further warranted by the specific intention of this proceeding. Its purpose is to provide the Commission with the information it needs to consult with and offer comments to the FCC, pursuant to federal law, rather than to render, as in most other proceedings, a final decision binding on California. The Coalition notes that the Commission demonstrated similar flexibility when it established modified procedures<sup>8</sup> in 1996 in response to its federal mandate to "arbitrate" interconnection disputes.

Finally, the Coalition and TRA recommend eliminating the MCR-established procedure whereby Pacific and interested parties file comments and responsive pleadings each time Pacific enters into a new interconnection agreement. They indicate that issues more critical than those involving interconnection agreements are likely to emerge by the time Pacific is ready to file its section 271 application.

In response, the Office of Ratepayer Advocates (ORA) supports the establishment of a 90-day pre-FCC filing requirement. It agrees with the Coalition and TRA that the existing record is stale and incomplete. However, ORA maintains that a comprehensive record, responsive to the Commission's consultative role, can be

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<sup>7</sup> PU Code § 311(d) directs the administrative law judge (ALJ) to prepare and file an opinion setting forth recommendations, findings, and conclusions no later than 90 days after the matter has been submitted. The PD is served upon all parties to the proceeding, and opening and reply comments are received.

<sup>8</sup> Resolution ALJ-168, "Establishes Rules for Implementing the Provisions of Section 252 of the Telecommunications Act of 1996."

developed through parties' written comments alone. ORA asserts that if there are hearings, there must be a PD and an opportunity for comments.

Pacific urges the Commission to deny the Motion. It characterizes the proposal as "an invitation to establish proceedings to delay and bog down...with open-ended issues and unlimited discovery." Pacific Response at 10. However, it states that the company has no objection to "notifying" the Commission and the parties 90 days in advance of its section 271 filing with the FCC. Following that notification and within the 90 days, Pacific recommends an additional round of written comments and reply comments on its current compliance with the Checklist. Further, Pacific exhorts the Commission to update the data on the state of competition in California telecommunications markets submitted last year in the Local Competition portion<sup>9</sup> of this consolidated proceeding. Any request, it asserts, "should require the CLCs<sup>10</sup> to state when each CLC plans to provide local service including facilities-based service, to various classes of customers, including residential customers." Id. at 9. After these submissions, if the conclusion is that there are remaining "holes in the record," a need for any additional evidence or elaboration on any section 271 issue, Pacific states that the Commission can either require further filings or act on an issue-by-issue basis. If the Commission provides for hearings, Pacific admonishes, they should be "limited and narrowly focused." Id. at 11.

### **Discussion**

On August 9, 1996, the MCR inaugurated this consolidated proceeding to enable the Commission to evaluate Pacific's compliance with section 271 of the Communications Act of 1934, as amended. Section 271 further provides for the FCC to consult with the state to verify BOC compliance with a 14-point Checklist as well as the presence of a facilities-based competitor offering service predominantly over its own

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<sup>9</sup> Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044.

<sup>10</sup> competitive local carriers.

network. The FCC has 90 days from the date of the BOC's filing to issue a written determination approving or denying the authorization requested in the application.

The MCR established a process to provide the Commission with the information it would need in order to determine Pacific's compliance with the Checklist. It directed parties to file comments on market and technical conditions, while a separate comment cycle examined Pacific's checklist compliance in the Commission's ongoing competition proceedings: Open Access Network Architecture Development (OANAD)<sup>11</sup> and Local Competition. The MCR also ordered parties to file comments, indicating whether an interconnection agreement met the requirements in the Checklist, following the filing of each interconnection agreement with the Commission. To facilitate expeditious review of a section 271 application, the current Managing Commissioner issued another MCR in February 1997, bifurcating the PU Code § 709.2 requirements.

From the beginning in this proceeding, we faced the tension of balancing several factors: the need for current detailed data on Pacific's Checklist compliance, a strict time constraint,<sup>12</sup> and uncertainty about exactly when Pacific would file its application. In addition, within the last six months, a sharper picture has emerged about what types of information the FCC finds most useful in a section 271 application. With the experience it had gained in the course of processing several initial applications, the FCC stated:

...we expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the [FCC] rely in making its findings thereon. An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. Thus, an applicant may not submit factual evidence gathered after the applicant's initial filing.<sup>13</sup>

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<sup>11</sup> R.93-04-003/I.93-04-002.

<sup>12</sup> Factoring in the shortness of its own 90-day statutory deadline, the FCC required relevant State commissions to file any written consultation no later than approximately 20 days after the BOC files with the FCC. Public Notice, FCC 96-469, December 6, 1996.

<sup>13</sup> Public Notice, FCC 97-330, September 19, 1997 at 2.

The FCC further declared that all factual assertions made by parties must be supported by credible evidence in order to be given any weight. It also required all parties to make substantive legal or policy arguments in legal briefs rather than throughout the submissions in a burdensome and disorganized manner.

In the past several months, we have also closely examined the FCC's detailed analysis of Operations Support Systems (OSS) in its Ameritech/Michigan Order. The FCC determined that while the OSS is used to provision services to competitors, it is not a Checklist item. However, since OSS embodies aspects of the Checklist, the measure of how well the OSS arrangement functions directly informs whether a BOC's provisioning of network elements and resold services is adequate. Thus, an examination of a BOC's OSS performance is integral to deciding whether the BOC is actually "providing"<sup>14</sup> all of the items in the Checklist.

For instance, it is apparent from the Ameritech/Michigan Order that a determination of whether the access to OSS functions supports interconnection, unbundled network elements, and services offered for resale<sup>15</sup> is pivotal to whether or not a BOC has met its OSS obligation under section 271. In addition, the FCC has indicated that it will consider all automated and manual processes that a BOC has set into place to provide access to OSS functions. For those functions that a BOC itself accesses electronically, the FCC will ascertain whether the BOC provided equivalent electronic access for competing carriers.

The issue of OSS, and how to adequately assess it in the context of a section 271 state evaluation, is of significant concern to this Commission. MCI, AT&T, and Sprint have all filed complaints against Pacific alleging that their entry into the local market was being constrained by Pacific's OSS arrangement. The three companies characterized Pacific's order processing as slow and inaccurate. While we dismissed

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<sup>14</sup> Ameritech/Michigan Order at para. 132.

<sup>15</sup> The three modes of competitive entry established by the Act.

the complaint cases in Decision 97-09-113, we determined that there were substantial problems with Pacific's OSS which required further scrutiny. With that in mind, on October 9, 1997, the Commission issued a joint rulemaking/investigation<sup>16</sup> in order to monitor Pacific's OSS implementation. Through this proceeding, we will determine reasonable standards of OSS performance and how to monitor improvements in the OSS arrangement. However, it is unlikely that the OSS OII will provide us with the type of data that we will need for our analysis of Pacific's OSS before the company files its section 271 application.

Further informing this Commission in its consultative role on section 271 is the FCC's expectation<sup>17</sup> that a BOC should be able to demonstrate that services, with OSS support designed to accommodate current and future demand, can be ordered, provisioned, and billed in an efficient, accurate, and timely manner. The FCC has also indicated that it will assess commercial usage as the optimal empirical evidence of compliance with a particular Checklist item.

Pacific commented favorably on the quality and quantity of information that has been gathered thus far in this proceeding. However, the company's suggestion that we can fill in any gaps in information through discrete subject area updates does not address the fact that much of the information in the record is simply not sufficient. We know much more today about the type of data on which the FCC will base its opinion than we knew a year ago. Thus, it is imperative that we be able to provide the FCC with the depth of analysis that it finds most probative.

Considering each of these several factors, we find substantial merit in the Coalition's and TRA's request that we establish a focused, time-sensitive, updated

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<sup>16</sup> R.97-10-016/I.97-10-017, Monitoring Performance of Operations Support Systems (OSS OII).

<sup>17</sup> Ameritech/Michigan Order at paras. 128 and 132.



procedure<sup>18</sup> which will provide us with quantitative data from both Pacific and the CLCs for our analysis to the FCC.

To this end, we direct Pacific to file with this Commission, and serve on all parties of record in this proceeding, a Notice of Intent to File a Section 271 Application (NOI) and a Draft Section 271 Application (draft application) no less than 90 days before the company files its application at the FCC.<sup>19</sup> The CLCs and other interested parties shall file comments on the NOI and draft application 30 days after Pacific files these documents at the Commission. Pacific shall file its response to the CLCs' and interested parties' comments on its NOI and draft 20 days later. While Pacific has expressed concern that such a process will enable its competitors to have a "second bite at the apple," we believe instead that it will enable all parties to have a comprehensive view of the competing positions that will challenge each other at the FCC. Moreover, it will give the Commission the opportunity to fully examine the contentions of Pacific, the CLCs, and interested parties regarding the application and potentially reach a determination on the most pressing issues.

We have also attached several appendices<sup>20</sup> to this ruling with questions in Appendix A directed to Pacific, and those in Appendix B directed to the CLCs. The respective appendices contain specific instructions to the parties. These instructions should be followed. As noted within the instructions, the questions seek "quantitatively-based explanations"<sup>21</sup> which may be accompanied by more general

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<sup>18</sup> This procedure is intended to address a section 271 application. Should pending federal district and appellate court proceedings alter the authorization required for the provision of in-region interLATA telecommunication services, at that time this Commission will establish an appropriate alternative process.

<sup>19</sup> Pacific shall also file an electronic version of the NOI and draft application, including all attachments, in Microsoft Word version 7.0 format.

<sup>20</sup> Appendices C and D are the procedural schedules for the revised section 271 process.

<sup>21</sup> In preparing their responses, parties are advised that the CPUC has responded to Public Notice CCBPol 96-22 on November 5, 1996 stating that protections afforded confidential documents in California are more stringent than those proposed at the FCC. The FCC issued

*Footnote continued on next page*

examples. We will consider solely anecdotal explanations to be non-responsive. Pacific shall file its responses to the questions posed in Appendix A either on March 31, 1998, or on the same date that it files the company's NOI and draft application, whichever date is the earlier. The CLCs shall file their responses to the questions posed in Appendix B on March 31, 1998 or 30 days after the NOI, whichever is earlier. Comments from all interested parties on the CLCs' responses to Appendix B shall be due either on April 30, 1998 or 50 days after Pacific files its NOI and draft if Pacific files its Appendix A responses prior to March 31, 1998. Comments from all interested parties on Pacific's responses to Appendix A shall be due either on April 30, 1998, if Pacific files its Appendix A responses on March 31, 1998, or 30 days from the filing date of its NOI and draft application, if Pacific files its Appendix A responses prior to March 31.

We agree with the Coalition that the intent of this proceeding is to assist the Commission in its advisory comments to the FCC, not render a final decision binding on California. Consequently, to again meet federally-imposed time constraints, we shall establish, within the next few weeks, a process similar to that adopted for the arbitration proceedings that we conducted pursuant to the Act. Such a process will give us the necessary flexibility to determine if there is a need for focused hearings should the replies to the appendices, or the comments and/or responses to the NOI and draft application raise disputed issues of fact.

Accordingly, the assigned ALJ will advise the parties 55 days after Pacific has filed its NOI and draft application whether or not there will be hearings on stated issues. We anticipate that such hearings would begin no sooner than 60 days, and end no later than 65 days, after Pacific files its NOI and draft application. If hearings are held, concurrent briefs shall be due 75 days after Pacific files the NOI and draft

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Protective Order DA 97-729 on April 11, 1997 which sets out the rules governing information provided with respect to 271 Applications.

application. Pursuant to the Act, the Commission shall submit its advisory opinion to the FCC approximately 20 days after Pacific files its application at the FCC.

We will continue to review PU Code § 709.2 separately in this revised process. It is imperative that under the timeline that we have charted, we focus on providing our best analysis to the FCC. While some of the requirements of § 709.2 may be addressed in a section 271 application, this Commission will have to examine issues strictly of concern to California in a distinct inquiry. Depending on the timing of Pacific's application, it is possible that the § 709.2 inquiry could take place during the time period after the Commission has submitted its comments to the FCC and before the FCC has rendered its decision. The assigned ALJ will issue a ruling after Pacific files its NOI and draft application setting any necessary hearing dates for the § 709.2 inquiry.

Effective today, we also grant the Coalition's and TRA's request to eliminate the comment and reply requirement when Pacific enters a new interconnection agreement.

Finally, parties should direct any procedural questions about this revised section 271 application process to the assigned ALJ.

Dated February 20, 1998, at San Francisco, California.

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Jessie J. Knight, Jr.  
Assigned Commissioner

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Jacqueline A. Reed  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Joint Managing Commissioner's and Administrative Law Judge's Ruling on all parties of record in this proceeding or their attorneys of record.

Dated February 20, 1998, at San Francisco, California.

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Berlina Gee

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.